No. 90-655

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

KN ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE FERTILIZER INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DAVID G. NORRELL
Counsel of Record
AMY J. BERENSON
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5070

Dated: November 21, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-655

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

KN ENERGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE FERTILIZER INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

On behalf of its member companies, The Fertilizer Institute submits this brief as *amicus curiae* in support of the petition by Freeport-McMoRan, Inc. for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

INTEREST OF AMICUS CURIAE

The Fertilizer Institute ("TFI") is a trade association that represents the fertilizer industry in the United States. Approximately 300 companies belong to The Fertilizer Institute, and TFI's members represent approximately 95 percent of the U.S. fertilizer production.

---

[1] The petitioners and respondent have consented to the filing of this brief. The letters granting their consent have been filed with the Clerk of the Court.

Many of The Fertilizer Institute's members have established a variety of subsidiaries, joint ventures and partnerships to conduct their business and to market their products throughout the United States. Because the Tenth Circuit's decision could have an extremely disruptive effect on the way TFI's members conduct and structure their business transactions, The Fertilizer Institute has a significant interest in this Court's review of the decision below.

STATEMENT

Freeport-McMoRan Oil & Gas Company ("McMoRan") and its parent company, Freeport-McMoRan, Inc. ("Freeport"), the petitioners here and plaintiffs below, obtained a verdict in their favor in the United States District Court for the District of Colorado after a full trial on the merits in November 1988. Subject matter jurisdiction was based on diversity of citizenship. In particular, at the time the complaint was filed, petitioners were incorporated in Delaware with their principal place of business in New Orleans, Louisiana. Respondent, KN Energy, was incorporated in Kansas with its principal place of business in Denver, Colorado.

While the case was pending, McMoRan reorganized its business and transferred its interest in the subject of this dispute to a limited partnership, FMP Operating Company ("FMPO"), for business reasons that are unrelated to this litigation. FMPO's limited partners included citizens from virtually every state, including Kansas and Colorado. Petitioners amended their complaint to add FMPO as a dispensable, non-diverse party, in conjunction with other amendments to the complaint, and KN raised no objection at the time to this addition of FMPO. This addition of FMPO led eventually to the jurisdictional dismissal of the case by the Tenth Circuit.

Some time after its addition to the case, FMPO merged into another affiliate, Freeport-McMoRan Oil & Gas Company ("FMOG"), a Delaware corporation with its principal place of business in New Orleans. Following this merger, all remaining claims relating to the subject matter of this litigation are held by FMOG, an entity that concededly is diverse to KN Energy. Thus, FMPO existed as a relevant corporate entity for only a brief period, and it had become irrelevant to the litigation during the pendency of the appeals to the Tenth Circuit.

On July 10, 1990, the Court of Appeals for the Tenth Circuit reversed the judgment of the district court and dismissed the entire action for lack of subject matter jurisdiction. 907 F.2d 1022. The court held that although diversity existed when the complaint was filed, the addition of FMPO as a plaintiff destroyed complete diversity among the parties and the jurisdiction that previously existed. The Tenth Circuit based this decision primarily on its interpretation of *Carden* v. *Arkoma Associates, Inc.*, 110 S. Ct. 1015 (1990).

Petitioners sought rehearing on two grounds. First, petitioners contended that contrary to the Tenth Circuit's interpretation, *Carden* did not overrule *sub silentio* the previously established rule that diversity jurisdiction must be determined at the time a complaint is filed and cannot be ousted by subsequent events. Second, petitioners filed a motion to dismiss FMPO as a party, since FMPO no longer existed and its successor, FMOG, admittedly was and is diverse to KN Energy. The Tenth Circuit denied rehearing and declined to dismiss FMPO, but the court did stay its mandate pending disposition of a timely petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court should review the decision below for three reasons. *First*, the Tenth Circuit's decision conflicts with the decisions of this Court and other circuits holding that diversity must be determined at the time a complaint is filed and that diversity is not ousted by subsequent events. The Tenth Circuit dismissed the case below because complete diversity was destroyed, long after the filing of the litigation, by a subsequent change in corporate structure that was wholly unrelated to the lawsuit. The court based its decision on an erroneous application of *Carden*, a case dealing solely with the question of *how*, not *when*, to determine the citizenship of a limited partnership. By interpreting *Carden* to require that a case be dismissed when subsequent events affect diversity, the Tenth Circuit has carved out a new and far-reaching rule that is fundamentally inconsistent with the long line of precedent regarding the time for determining diversity.

Second, by declining to dismiss FMPO as a dispensable, non-diverse party, the Tenth Circuit's decision also conflicts with the recent holding of this Court in *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 109 S. Ct. 2218 (1989). In that decision, this Court held that a court of appeals can and should dismiss a dispensable, non-diverse party on appeal, particularly where the failure to correct a jurisdictional defect by dismissal would cause a waste of time and judicial resources. *Newman-Green* is remarkably applicable in this case, where, before dismissal, there was a full trial on the merits and a verdict rendered in the district court. Dismissal here will only result in forcing the petitioners to refile and relitigate an identical lawsuit, to the extent they are still able to do so.

Third, the Tenth Circuit's decision will have immediate adverse consequences for the conduct of business as well as litigation. If the Tenth Circuit's rule stands, businesses in that circuit will be forced immediately to conform their business relationships to the new rule and forego implementing necessary and prudent business decisions or changes in corporate structure. Otherwise, businesses in the Tenth Circuit would jeopardize the jurisdictional basis and risk dismissal of any cases they have pending in federal court. The Tenth Circuit's decision would thus pose an unwarranted and unnecessary constraint on countless businesses, and especially on large entities with complex corporate structures, which are frequently required to make changes in business relationships and structures for reasons that are wholly unrelated to existing or potential litigation.

In addition to forcing an immediate change in business conduct, the Tenth Circuit's decision will create widespread uncertainty with regard to previously well-settled procedural rules governing diversity and would result in a needless waste of judicial resources. Prior to the decision below, courts uniformly resolved jurisdictional questions concerning diversity, and thus established the appropriate forum for the litigation, at the inception of a lawsuit. For businesses caught unaware by the Tenth Circuit's new rule or unable to avoid changing their corporate structure, the decision below will expose them to disruptive and potentially dispositive jurisdictional challenges at any stage in their litigation proceedings. Indeed, all cases in federal courts bound by the Tenth Circuit rule would be subject to the threat of dismissal, should subsequent events destroy complete diversity, even after years of discovery or a verdict has been rendered. As is apparent in this case, such procedural disruption would pose unnecessary and wasteful burdens on the parties, the judges, and other litigants awaiting judicial attention. *See Newman-Green*, 109 S. Ct. at 2220.

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS REGARDING SIGNIFICANT JURISDICTIONAL ISSUES.

The decision below presents at least two conflicts with prior decisions of this Court and lower courts regarding the issue of whether post-filing events divest federal courts of diversity jurisdiction during the pendency of a lawsuit. First, the Tenth Circuit's decision—that a subsequent change in corporate structure and the addition of a non-diverse subsidiary necessarily destroys diversity jurisdiction—conflicts with this Court's decision in *Carden* v. *Arkoma Associates*, 110 S. Ct. 1015 (1990). Before this Court decided *Carden*, the federal courts had adopted conflicting approaches for determining the citizenship of a limited partnership. *Carden* resolved that conflict by holding that courts must consider the citizenship of all the members in a limited partnership when the courts determine whether complete diversity exists between the plaintiffs and defendants in an action. 110 S. Ct. at 1021.

The Tenth Circuit significantly extended this holding in the decision below, and in so doing, has relied on *Carden* to create an entirely new rule, contrary to this Court's decision. Specifically, after the court of appeals concluded that some of FMPO's partners would not be diverse to KN Energy, the Tenth Circuit went on to hold that "*Carden* establishes that FMP Operating's *addition* as the real party in interest destroys the district court's diversity jurisdiction" *after* the filing of the litigation. 907 F.2d at 1025 (emphasis added). The Tenth Circuit further implied that the Constitution compelled this application of *Carden*, and this dismissal based on subsequent events, because the scope of diversity jurisdiction is defined by Article III and by Congress and cannot be changed by the courts. *Id.* at 1024.

This holding fundamentally misconstrues *Carden*. The Supreme Court's decision in *Carden* dealt with *how* to

determine the citizenship of a limited partnership for diversity purposes at the outset of a case. *Carden* did not address, nor did the facts require it to consider, the appropriate *time* for determining diversity.[2] Given the actual holding and the facts of *Carden*, there is no basis for the Tenth Circuit's extension of *Carden* to hold that diversity existing at the time a complaint is filed must be divested by subsequent events, such as the addition of a limited partnership as a party.

Second, the Tenth Circuit's decision is sharply inconsistent with numerous decisions by this Court and other circuits that diversity must be determined at the time a complaint is filed and that once established, diversity jurisdiction is not divested by subsequent events. This Court recognized long ago the general principle that the existence of diversity jurisdiction should be determined on the basis of facts and citizenship pertinent at the time an action is filed. *Clark* v. *Mathewson*, 12 Pet. 164, 171 (1838). Since that time, other courts have uniformly applied this principle and held that many other types of *subsequent* events have no effect on jurisdiction, including the intervention of a non-diverse dispensable party,[3] the substitution or joinder of a *pendente lite* transferee,[4]

---

[2] Other lower courts have interpreted *Carden* in this way as well. *See, e.g., Northern Trust Co.* v. *Bunge Corp.*, 899 F.2d 591, 594 (7th Cir. 1990) (citing *Carden* for the principle that citizenship for a limited partnership is determined by that of the individual partners).

[3] *See, e.g., Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U.S. 48, 53-54 (1922); *Harris* v. *Illinois-California Express, Inc.*, 687 F.2d 1361, 1366-1368 (10th Cir. 1982); *American National Bank & Trust Co. of Chicago* v. *Bailey*, 750 F.2d 577, 582-83 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *Gaines* v. *Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970).

[4] *See, e.g., Smith* v. *Sperling*, 354 U.S. 91, 93 & n.1 (1957); *Fred Harvey, Inc.* v. *Mooney*, 526 F.2d 608 (7th Cir. 1975); *Television Reception Corp.* v. *Dunbar*, 426 F.2d 174, 177-178 (6th Cir. 1970); *Ransom* v. *Brennan*, 437 F.2d 513 (5th Cir.), *cert. denied*, 403

changes of citizenship, or even a reduction of the amount actually in controversy.[5]

In fact, just prior to the *Carden* decision, this Court reaffirmed the principle that "the existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green*, 109 S. Ct. at 2222. In *Newman-Green*, this Court also recognized that there were only limited exceptions to this principle, citing, for example, 28 U.S.C. § 1653 (allowing defective allegations of jurisdiction to be amended in the trial or appellate courts) and Rule 21 in the Federal Rules of Civil Procedure (allowing district and appellate courts to dismiss a dispensable non-diverse party to remedy defective jurisdiction). The Tenth Circuit, however, has carved out its own exception, based on the occurrence of subsequent events, not recognized in decisions of this Court or other lower courts.

Thus, by misinterpreting *Carden*, the Tenth Circuit has created a conflict among the circuits regarding diversity jurisdiction and has set dangerous precedent to abrogate—without any guidance from this Court—a rule firmly established within the federal court system. To the extent the Tenth Circuit perceives a policy now of cutting back on diversity jurisdiction, that policy should be implemented by Congress—not by the Tenth Circuit's adoption of a new rule that conflicts with the decisions of other courts and creates widespread uncertainty.

U.S. 904 (1971); *Brough* v. *Strathmann Supply Co.*, 358 F.2d 374 (3d Cir. 1966).

[5] *See also Louisville, N.A. & C. Ry Co.* v. *Louisville Trust Co.*, 174 U.S. 552 (1899); *IMFC Professional Services of Florida, Inc.* v. *Latin American Homes Health, Inc.*, 676 F.2d 152, 157 (5th Cir. 1982) (subsequent changes in the citizenship of the parties); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289-93 (1938); *Anderson Thompson, Inc.* v. *Logan Grain Co.*, 238 F.2d 598, 601 (10th Cir. 1956) (reduction in the amount claimed to a sum below the jurisdictional amount).

II. THE TENTH CIRCUIT'S REFUSAL SIMPLY TO DISMISS THE NON-DIVERSE PARTY CONFLICTS WITH THIS COURT'S DECISIONS REGARDING PROCEDURES FOR CURING JURISDICTIONAL DEFECTS.

Apart from the conflicts described above, the Tenth Circuit's refusal simply to dismiss FMPO on rehearing, as requested by petitioners, also conflicts with this Court's decision in *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 109 S. Ct. 2218 (1989). In particular, this Court held in *Newman-Green* that a court of appeals can and should dismiss a non-diverse dispensable party where the failure to dismiss that party would cause an unnecessary waste of time and resources.

Indeed, the concern expressed by this Court in *Newman-Green* regarding the imposition of unnecessary and wasteful burdens on the judicial system is particularly applicable in this case. Here, the district court has already completed a full trial on the merits and entered a verdict for approximately two million dollars.[6] There was no evidence or suggestion here that FMPO had originally been omitted from the litigation in order to create jurisdiction, since FMPO was created after the filing of the complaint. In addition, FMPO no longer had any interest in or relationship to the subject matter of the litigation when the Tenth Circuit rendered its decision. Moreover, unlike *Newman-Green*, where the dismissal ordered by this Court cured an original jurisdictional defect, diversity here concededly *was* appropriate at the outset and the dismissal would simply cure a "defect" that arose late in the case. *See* 109 S. Ct. at 2227.

In sum, the Tenth Circuit's failure to dismiss FMPO on rehearing as a dispensable party conflicts with the procedures required by this Court and sound judicial economy.

---

[6] In *Newman-Green*, the district court had granted partial summary judgment for each party.

III. THE DECISION BELOW WILL FORCE IMMEDIATE CHANGES AND DISRUPTION OF BUSINESS DECISIONS AND WILL CREATE WIDESPREAD UNCERTAINTY IN LITIGATION.

Businesses and litigants both need a reasonable level of certainty regarding procedural and jurisdictional issues. Prior to the Tenth Circuit's decision, the rules regarding the establishment of diversity jurisdiction and the relevance of subsequent changes in jurisdictional facts were relatively well settled. Now, however, to comply with the Tenth Circuit's new rule, businesses will immediately have to reconsider their business and corporate structure decisions in order to avoid jeopardizing cases they have pending—or, as in this case, a judgment rendered—throughout the Tenth Circuit.

Unless reviewed by this Court, the decision below will turn routine business judgments into business risks. The district courts in a number of states obviously are bound to apply the Tenth Circuit's rule, not only to a transfer of assets to a limited partnership, but to a myriad of other significant business transactions. For example, under the Tenth Circuit's new rule, diversity would also be destroyed by such events as mergers or acquisitions, the conversion of existing businesses to a partnership form to raise additional capital, and other business expansions or restructuring.

Businesses in the Tenth Circuit will no longer be able to base their commercial decisions simply on the relevant business considerations, but instead will also have to account for whether their decisions would jeopardize jurisdiction—after the fact—in any litigation they have pending. If faced with the prospect of having to relitigate *all* pending federal cases, the deterrent effect on the conduct of business would be great, particularly for large, diverse businesses that make numerous decisions on a daily basis for prudent business reasons totally unrelated to pending litigation.

Furthermore, for businesses unable to conform their relationships immediately, the Tenth Circuit's decision creates tremendous uncertainty with regard to previously well-settled procedural rules governing diversity. Prior to the decision below, courts uniformly resolved jurisdictional questions concerning diversity—and established the appropriate forum—at the inception of the lawsuit. Now, in the Tenth Circuit, disruptive challenges to the court's jurisdiction can be mounted at any point in the proceeding. Parties in federal courts bound by the decision below will be faced with the looming threat of dismissal and the necessity to refile their lawsuit should the occurrence of subsequent events destroy diversity. Under the Tenth Circuit's rule, such subsequent events could include not only business transactions, but events that other courts have already found to have no effect on jurisdiction. *See* notes 3-5, *supra*.

Finally, the Tenth Circuit's decision will impose unnecessary and wasteful burdens on the parties, the courts, and other litigants awaiting judicial attention. *Newman-Green*, 109 S. Ct. at 2220. As is evident in the case at bar, the decision below will force parties to refile and relitigate cases after devoting years of effort to the litigation in federal court. Nothing but a waste of time and resources would be engendered by forcing these parties to begin anew. *Newman-Green*, 109 S. Ct. at 2226.

Because of the conflicts, the uncertainty, the disruption of business, and the waste of judicial resources caused by the Tenth Circuit's decision, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID G. NORRELL
Counsel of Record
AMY J. BERENSON
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5070

Dated: November 21, 1990